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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

DANIEL MARTINEZ,

Defendant and
Appellant.

B288365

(Los Angeles County
Super. Ct. No. BA447396)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed and remanded.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Noah P. Hill and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant and appellant Daniel Martinez guilty of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a) [count 1]),¹ two counts of sexual intercourse or sodomy with a child age 10 or younger (§ 288.7, subd. (a) [counts 2 & 3]), and oral copulation or sexual penetration of a child age 10 or younger (§ 288.7, subd. (b) [count 4]).

The trial court sentenced Martinez to the upper term of 8 years in count 1, imposed consecutive terms of 25 years to life in counts 2 and 3, and imposed a consecutive term of 15 years to life in count 4, for a total term of 73 years to life.

Martinez contends that the trial court misinstructed the jury with respect to the different intents required for conviction in each of the offenses, and that it impermissibly relied on factors relating to the victim's minority, which is an element of the offense of lewd act upon a child, to impose the high term in count 1. In supplemental briefing, Martinez contends that imposition of court facilities and operations assessments and a restitution fine without a prior determination that he was able to pay violated his rights to equal protection and due process. He also notes a

¹ All statutory references are to the Penal Code unless otherwise specified.

discrepancy between the trial court's oral pronouncement and the abstract of judgment regarding the amount of the restitution fine imposed.

We remand for the trial court to correct the abstract of judgment and minute order dated February 15, 2018, to properly reflect that it imposed a \$1,000 restitution fine (§ 1202.4, subd. (b)) and imposed and stayed a corresponding \$1,000 parole revocation fine (§ 1202.45, subd. (a)). In all other respects, the judgment is affirmed.

DISCUSSION²

Instructional Error

Martinez contends that the trial court erred by instructing the jury under CALCRIM No. 251 that to find him guilty of all of the offenses charged it must find proof that he acted with the requisite specific intent, although several of the offenses with which he was charged are general intent crimes. We conclude that the claim is without merit, but that even if the trial court erred, the error was harmless.

² We do not include a recitation of the facts, as they are not necessary for resolution of the issues on appeal.

Legal Principles

“The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.]’ . . . [Citation.]” (*People v. Saavedra* (2018) 24 Cal.App.5th 605, 614 (*Saavedra*).) The duty encompasses the obligation to give a correct instruction on the concurrence of act and intent applicable to each charged crime. (*Ibid.* [duty to instruct on union of act and intent for specific intent crime]; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922–923 [duty to instruct on union of act and intent for general intent crimes that require specific mental state].)

When an offense requires general intent, “the ‘person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she *intentionally* does a prohibited act’ [Citation.]” (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1380–1381.) “When the definition [of an offense] refers to [the] defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.’ [Citation.]” (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1186.)

“The correctness of jury instructions is determined from the entire charge of the court.” (*Saavedra, supra*, 24 Cal.App.5th at p. 614.) “Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.” (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

“[T]o prevail on a claim that jury instructions were misleading, the [defendant] must prove a reasonable likelihood that the jury misunderstood the instructions as a whole.” (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147.) We independently review a claim of instructional error. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Proceedings

Here, the court instructed the jury as to the union of act and intent with respect to *all* of the charged offenses under CALCRIM No. 251, the instruction intended for use when the case involves only specific intent crimes and/or general intent crimes that require a specific mental state, such as knowledge or malice. (Judicial Council of Cal., Crim. Jury Instns. (2019) Bench Notes to CALCRIM No. 251, p. 66 (Bench Notes).)³ The instruction was given as follows:

“The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crimes in this case, that person must not only intentionally commit the prohibited

³ If a case involves general intent crimes without a specific mental state requirement, courts should give CALCRIM No. 252 instead of CALCRIM No. 251. (Bench Notes to CALCRIM Nos. 251, 252 (2019) pp. 66, 69.) When a case involves crimes with different intent requirements the court should identify which counts require the specific intent, general intent, and/or a specific mental state in the instruction. (*Ibid.*)

act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime.”

Two of the offenses charged, lewd act upon a child under the age of 14 years (§ 288, subd. (a)) and sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b)), are specific intent crimes. (See *People v. Martinez* (1995) 11 Cal.4th 434, 440, 444 (*Martinez*) [lewd acts]; *People v. Ngo* (2014) 225 Cal.App.4th 126, 157 (*Ngo*) [sexual penetration].) Sexual intercourse with or sodomy of a child 10 years of age or younger (§ 288.7, subd. (a)), and oral copulation of a child 10 years of age or under (§ 288.7, subd. (b)) are general intent crimes without mental state requirements, however.⁴ (See *People v. Mendoza* (2015) 240 Cal.App.4th 72, 79 [sexual intercourse and sodomy]; *Saavedra, supra*, 24 Cal.App.5th at p. 613 [oral copulation].) Thus, the trial court should have instructed the jury under CALCRIM No. 252, or included CALCRIM No. 250 in addition to CALCRIM No. 251. (Bench Notes to CALCRIM Nos. 250, 251, 252 (2019) pp. 63, 66, 69.)

The jury was properly instructed regarding the elements of the individual crimes—including specific intent—under CALCRIM Nos. 1110 (lewd acts), 1127 (sexual

⁴ The intent required for conviction under section 288.7, subdivision (b) depends upon which of the two prohibited acts the jury finds the defendant committed. (See *Ngo, supra*, 225 Cal.App.4th at p. 157 [sexual penetration]; *Saavedra, supra*, 24 Cal.App.5th at p. 613 [oral copulation].)

intercourse and sodomy), and 1128 (oral copulation and sexual penetration).⁵

Analysis

The crux of Martinez's contention is that the trial court's failure to distinguish between the offenses requiring general intent and the offenses requiring specific intent led the jury to convict him of general intent crimes with the belief that the instructions for those crimes contained a specific intent element when no such requirement exists, and that, having found that he harbored specific intent in the general intent crimes, the jury was likely led to believe that all that was required to convict him of the specific intent crimes was the intentional commission of the prohibited act, effectively "flat-lin[ing] any meaningful distinction between the doing of a prohibited act and the doing of a prohibited act concurrently with a specific mental state."⁶

⁵ Martinez does not contend that the instructions for the individual crimes omitted elements or created ambiguity as to the elements of the crimes.

⁶ Martinez also complains that the trial court failed to instruct the jury that the prosecution was required to prove that he "committed the prohibited act[s] with wrongful intent." In fact, the jury was instructed with this precise language under CALCRIM No. 251: "The crimes charged in

We are not persuaded. Viewing the instructions as a whole, with respect to the general intent crimes, the jury was correctly instructed that “[the crimes] require[d] proof of the union, or joint operation, of act and wrongful intent” and that it must find Martinez “intentionally commit[ted] the prohibited act[s]” before it could convict him. (CALCRIM No. 251.) The jury was instructed regarding each of the elements it must find for the individual general intent crimes in the instructions pertaining to those crimes. (CALCRIM Nos. 1127 and 1128.) The trial court met its obligation to instruct “on the general principles of law relevant to and governing the case. [Citation.]’ . . . [Citation.]” (*Saavedra, supra*, 24 Cal.App.5th at p. 614.)

Having found that the court did not err in instructing the jury on the general intent crimes, we find it even less likely that the court’s instructions on the specific intent crimes were affected. As with the general intent crimes, the jury was properly instructed on the union of act and intent and the necessity that Martinez intended to commit the acts under CALCRIM No. 251. It was further instructed that it must find Martinez harbored a specific intent with respect to those crimes and directed to the individual instructions, which undisputedly instructed on intent.⁷

this case require proof of the union, or joint operation, of act and wrongful intent.”

⁷ California courts have held that “[t]he language of [CALCRIM No. 1128] cover[s] both the requisite intent per

Even if we were to find error, however, it would lie in the charge to the jury to find specific intent before it could convict on the general intent crimes, which, as the People point out, could only have benefitted Martinez by increasing the People's burden. Under these circumstances, any error is harmless under both the federal constitutional standard of harmless error set forth in *Chapman v. State of California* (1967) 386 U.S. 18, 24 [reversal required unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt"], and the less stringent state standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal required if "it is reasonably probable that a result

se and the requirement of a concurrence of act and specific intent [for conviction of sexual penetration of a child 10 years of age or younger]." (*Saavedra, supra*, 24 Cal.App.5th at pp. 615–616, fn. omitted; see also *Ngo, supra*, 225 Cal.App.4th at p. 162.) Specifically, CALCRIM No. 1128 instructs: "*Sexual penetration* means penetration, however slight, of the genital or anal opening of the other person by any foreign object, substance, instrument, or device, or by any unknown object for the purpose of sexual abuse, arousal, or gratification." The language "for the purpose of sexual arousal, gratification, or abuse" specifies the required intent. (*Ngo, supra*, at p. 162.)

CALCRIM No. 1110, which lists the elements of lewd act upon a child under the age of 14, is even more explicit. It contains the requirement that "[t]he defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." There can be no question that this sets forth the specific intent requirement.

more favorable to the appealing party would have been reached in the absence of the error”].

Sentencing Error

Martinez also contends that the trial court erred in sentencing him to the high term of eight years in state prison in count 1 because it relied on the victim’s youth, which was an element of the crime of lewd or lascivious acts upon a child under the age of 14. (§ 288, subd. (a).) We reject this contention as well.

Proceedings

Following Martinez’s conviction by jury, the trial court held a sentencing hearing during which the prosecution argued the trial court should consider the victim’s vulnerability. Specifically, the prosecution cited evidence that Martinez knew the victim had once confided in her mother about Martinez’s abuse, Martinez denied it, and that left the victim in a vulnerable position with no one to believe her or protect her. The prosecution further argued that Martinez used this vulnerability to continue the abuse for several years. With respect to the conviction of lewd act upon a child under the age of 14, the trial court pronounced the sentence in count 1 as follows: “. . . Mr. Martinez is to be imprisoned in the state prison for a determinate term of eight years. The court is selecting the high term as to count

1. [¶] This was an ongoing event. This was not a single isolated experience or even a few experiences. This is a sexual assault on a defenseless little girl over the period of at least a couple of years. Her vulnerability, her inability to defend herself, and taking advantage of that, in the court's view, justifies the high term as to count 1."

Defense counsel did not object to the court's basis for selecting the high term.

Legal Principles

A trial court's sentencing decision is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*Ibid.*) A trial court abuses its discretion "if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*) Where, as in this case, age is an element of the offense, "a crime victim can be deemed particularly vulnerable as an aggravating factor 'for reasons not based solely on age, including the victim's relationship with the defendant and his abuse of a position of trust.' [Citations.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 154; see also *People v. Estrada* (1986) 176 Cal.App.3d 410, 418 (*Estrada*) [proper

to consider fact that the victim was a “particularly vulnerable, small child, shy and withdrawn” to impose high term].) In such cases, however, “aggravating a sentence due to ‘particular vulnerability,’ where vulnerability is based *solely* on age, is improper” (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693–1694, disapproved on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117.)

Analysis

We agree with the People that Martinez forfeited his contention by failing to object below. (*People v. Scott* (1994) 9 Cal.4th 331, 356 [“complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal”].) He has also waived his ineffective assistance of counsel claim by failing to raise it in the opening brief. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [defendant waived ineffective assistance of counsel claim first raised in reply brief].)

However, even if we were to consider the merits of his argument Martinez’s claim would fail. Martinez concedes that the trial court identified several factors in seriatim to support the finding of vulnerability, but attempts to equate every factor to a finding about the victim’s age and minority. Martinez’s characterization of the trial court’s reasoning is not supported by the transcript of the sentencing hearing. The trial court did not mention the victim’s age when

selecting the high term. The trial court's express reference to the victim as "defenseless" and the court's comments about the "ongoing" nature of the abuse, extending "over the period of at least a couple of years," instead echoed the prosecution's arguments that Martinez isolated the victim from her mother, leaving the victim without anyone to believe in her or protect her, and that he then used the victim's isolation to repeatedly abuse her over a course of years, without fear of discovery. (See *People v. Estrada*, *supra*, 176 Cal.App.3d at p. 420 ["review of the transcript of the entire sentencing process reveals no grounds for reversal of the court's sentence"].) The court's findings relied on Martinez's actions, the circumstances of the crimes, and the nature of the victim—not the victim's age. A single factor is sufficient to support a court's sentencing decision. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.) Here, the court gave multiple valid reasons for its imposition of the high term, including the fact that the abuse was ongoing, frequent, and that Martinez took advantage of the victim's inability to defend herself. We find no abuse of discretion.

Ability to Pay

At the sentencing hearing, the trial court imposed court operations assessments totaling \$160 (§ 1465.8), court facilities assessments totaling \$120 (Gov. Code, § 70373), and a restitution fine of \$1,000 (§ 1202.4, subd. (b)). It imposed and stayed a parole revocation fine of \$1,000.

(§ 1202.45, subd. (a).) Martinez did not object to imposition of the assessments and fines, and nothing in the record suggests that he was unable to pay them.

Martinez contends that the trial court's failure to determine whether he had the ability to pay the assessments and fines prior to their imposition violated his constitutional rights to due process and equal protection under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). He requests that we strike the court operations and court facilities assessments, and stay execution of the restitution fine unless and until the People prove that he has the present ability to pay the fine, as the Court of Appeal in *Dueñas* did. Martinez argues that the holding of *Dueñas* applies to him retroactively because his appeal was not yet final when the case was filed. He contends that he has not forfeited the issue because "the claim of error presents a federal and state constitutional claim that raises a pure question of law based on undisputed facts," and because "the state of the law at the time was such that it would have been futile to object before the trial court." We reject these arguments.

Preliminarily, we agree with the parties that there is a discrepancy in the imposition of fines that requires clarification. Specifically, although the trial court imposed a \$1,000 restitution fine and imposed and stayed a corresponding \$1,000 parole revocation fine at the sentencing hearing, the abstract of judgment and minute order reflect restitution and parole revocation fines of \$300 each. The court's pronouncement controls, and the abstract

of judgment must be corrected to reflect imposition of the \$1,000 restitution fine under section 1202.4, subdivision (b), and imposition and stay of the \$1,000 parole revocation fine under section 1202.45, subdivision (a). (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 “[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment”].)

Martinez forfeited any challenge to the trial court’s imposition of a fine, fee, or assessment on the basis that the court failed to consider his ability to pay because he did not object in the trial court. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*).) Although there are exceptions to the rule of forfeiture, such as when the defendant raises a constitutional claim that is a pure question of law (*People v. Welch* (1993) 5 Cal.4th 228, 235), or when the state of the law was such that “an objection would have been futile or wholly unsupported by substantive law then in existence” (*Id.* at p. 237), neither exception applies here.

“Contrary to his assertion, [Martinez] does not present a pure question of law based on undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) Rather, he requests a factual determination of his alleged inability to pay based on a record that contains nothing more than his reliance on appointed counsel” (*Frandsen, supra*, 33 Cal.App.5th at p. 1153.)

With respect to the futility of an objection, Martinez’s ability to pay was a statutory consideration with respect to

the \$1,000 restitution fine, which was by far the most significant fine imposed. Section 1202.4 requires a trial court to impose a restitution fine between \$300 and \$10,000 absent “compelling and extraordinary reasons” not to do so in any case in which a person is convicted of a felony. (§ 1202.4, subd. (b).) The statute permits the trial court to consider the defendant’s ability to pay as a factor when it imposes a fine greater than the \$300 statutory minimum, as the trial court did in Martinez’s case. (§ 1202.4, subd. (c).) It is “incumbent on [the defendant] to object to the fine and demonstrate why it should not be imposed.” (*Frandsen, supra*, 33 Cal.App.5th at p. 1154.) Because the \$1,000 restitution fine imposed is greater than the statutory minimum, it would not have been futile for Martinez to request an ability to pay determination, which the statute expressly contemplates, and his failure to do so forfeits his argument on appeal. (*Ibid.*)

Finally, any record that Martinez made regarding his inability to pay the \$1,000 restitution fine would have also addressed the \$280 in court operations assessments (§ 1465.8) and court facilities assessments (Gov. Code, § 70373). “Given his failure to object to a [\$1,000] restitution fine based on inability to pay, [Martinez] has not shown a basis to vacate assessments totaling [\$280] for inability to pay.” (*Frandsen, supra*, 33 Cal.App.5th at p. 1154.)

DISPOSITION

We remand for the trial court to correct the abstract of judgment and minute order dated February 15, 2018, to properly reflect that it imposed a \$1,000 restitution fine (§ 1202.4, subd. (b)) and imposed and stayed a corresponding \$1,000 parole revocation fine (§ 1202.45, subd. (a)). In all other respects, the judgment is affirmed.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

KIM, J.